

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review of the Decision of the)	
Universal Service Administrator by)	
)	
International Business Machines Corporation)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY**

**INTERNATIONAL BUSINESS MACHINES CORPORATION
REGARDING THE FUNDING REQUEST OF
THE WINSTON-SALEM/FORSYTH COUNTY SCHOOL DISTRICT**

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SUMMARY

IBM requests Commission review of an April 22, 2003 Funding Commitment Decision Letter issued by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”). The SLD denied funding under the Schools and Libraries Funding Mechanism (the “E-rate program”) to the Winston-Salem/Forsyth County School District (“WSSD”) of Winston-Salem North Carolina.

SLD’s treatment of WSSD’s application was arbitrary and capricious. As its flawed reason for the denial, SLD erroneously claimed WSSD’s Form 470 failed to identify the specific services WSSD sought. In fact, WSSD’s Form 470 provided a specific description of the services and functions it was seeking. More importantly, SLD has repeatedly granted in the past funding applications whose underlying 470s were virtually identical to, or even less specific than, that used by WSSD. SLD’s disparate treatment of WSSD’s application constitutes arbitrary and capricious decision-making which is impermissible under principles fundamental to administrative law.

Moreover, SLD’s action usurps the Commission’s rulemaking authority. WSSD met the requirements established by the Commission in its rules regarding the level of specificity required in Form 470s. SLD’s attempt to create additional requirements is not legally permissible since SLD has no rulemaking authority.

Finally, SLD cites precedent to support its funding denial that does not, and cannot, authorize its arbitrary, capricious, and unlawful action.

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**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
INTERNATIONAL BUSINESS MACHINES CORPORATION**

International Business Machines Corporation (“IBM”), pursuant to Section 54.719 of the Commission’s rules,¹ hereby requests the Commission’s review of the Universal Service Administrator’s April 22, 2003 decision denying funds under the Schools and Libraries Funding Mechanism (the “E-rate program”) to the Winston-Salem/Forsyth County School District (“WSSD”). For the reasons detailed below, the Commission should reverse the SLD’s decision and grant WSSD’s funding request.

I. FACTUAL BACKGROUND

The Winston-Salem/Forsyth County School district (“WSSD”) has described the facts underlying its Year 2002 E-rate funding request in its Request

¹ 47 C.F.R. § 54.719.

for Review (“WSSD Request”), which it is filing contemporaneously with the instant request. The WSSD Request makes clear that WSSD conducted a competitive procurement of the internal connections services and functions for which it sought and was denied E-rate funding. IBM will not belabor those facts with a duplicative statement of them in the instant request but instead refers the Commission to the statement of facts and supporting evidence in the WSSD Request. IBM has an interest in the matter under review because it is the service provider selected by WSSD to provide internal connections during USAC Funding Year 5 pursuant to FRNs 842482, 842638, 842757, 844679, 844736, 844923, 844980, 845026, 845059, 845096 on WSSD’s Form 471 (No. 302305).

II. DISCUSSION

The WSSD Request demonstrates that WSSD used a competitive bidding process that complied with the Commission’s requirements and selected the most cost-effective provider to implement the next step in its technology plan during Funding Year 2002. As discussed below, SLD’s denial of certain WSSD funding requests arbitrarily deviated from established SLD practice and violated existing Commission rules and policies. Because SLD has no authority to promulgate rules or make policy for the E-rate program, SLD’s creation and arbitrary imposition of new Form 470 standards and requirements cannot provide a lawful basis for denying WSSD’s funding application.

A. SLD’s Disparate Treatment Of WSSD’s Application Was Arbitrary and Capricious

SLD’s fundamentally flawed rationale for denying WSSD’s application was that WSSD “did not identify the specific services sought – either clearly on the

470 or in the RFP – to encourage full competition on major new initiatives.” This statement is factually incorrect; WSSD’s Form 470 provided a specific and complete description of the services and functions it was seeking. Moreover, WSSD’s description tracked the level of detail that SLD has accepted repeatedly in the past for applications it has granted. SLD’s criticism of WSSD’s “RFP” is simply inexplicable; WSSD did not issue an RFP for the E-rate eligible services and functionalities specified in the underlying 470. SLD’s inconsistent and confused treatment of WSSD’s funding requests was therefore arbitrary and capricious, and must be reversed.

SLD has repeatedly granted funding applications in the past that used service descriptions in their underlying Form 470s which were virtually identical to those used by WSSD. For example, SLD granted millions of dollars in internal connections funding to the Houston Independent School District² in Year 2002 pursuant to a Form 470³ which requested as a “Service or Function” in Block 10 “wiring (Cat3, Cat5, coax, fiber conduit, wiring accessories),” specifying a quantity of “350 buildings.” WSSD requested as a “Service or Function” in Block 10 of its Form 470⁴ “wiring (Cat3, Cat5, coax, fiber, conduit, wiring accessories)” for “126 buildings.” Houston requested “routers, servers, switches, hubs, and upgrades” for “350 buildings”; WSSD requested “routers, servers, switches, hubs and upgrades” for “126 buildings.” Comparable similarities exist for every line

² See entries for Houston Independent School District, Form 471 No. 295389, FRN No. 791022, SLD Funding Request Data Retrieval Tool at <http://www.sl.universalservice.org/funding/OpenDataSearch>, last visited June 19, 2003.

³ The Houston Form 470 appears in the WSSD Request at Tab 6.

⁴ The WSSD Form 470 appears in the WSSD Request at Tab 5.

item on the two 470s. Indeed, the items listed in the two applications are identical but for a handful of entries within individual line items that differ only slightly.⁵

Yet SLD granted Houston's funding request while denying WSSD's.

Similarly, SLD has granted funding to schools who used 470 descriptions that were less specific than WSSD's 470. For example, the Los Angeles Unified School District ("LAUSD") was granted millions of dollars in internal connections funding in Year 5.⁶ In its Form 470, which appears as Tab 11 to the WSSD Request, LAUSD simply repeats in alphabetical order generic entries from SLD's eligible services list (e.g., "Wiring, Internal," "LAN," "Wireless Wan [sic]"). Even the Form 470 itself instructs applicants to use descriptions that are less detailed than many used by WSSD. Block 10 of the Form directs applicants to "[s]pecify each service or function" they seek and offers as an example "local area network." Yet SLD rejected WSSD's more detailed Form 470.

SLD's rejection of WSSD's 470 in the instant case and acceptance of similar 470s when used by Houston, LAUSD, and similarly situated schools,⁷ epitomizes arbitrary and capricious decision-making. SLD has violated fundamental principles of fairness and administrative procedure, which the Commission cannot permit. "An agency action that constitutes an unexplained

⁵ For example, Houston's Form 470 specifies "wireless (LAN, WAN)." WSSD specifies "wireless service, LAN" in the corresponding line item on its Form 470.

⁶ See, e.g., entry for Los Angeles Unified School District, Form 471 No. 289090, FRN No. 759443, SLD Funding Request Data Retrieval Tool at <http://www.sl.universalservice.org/funding/OpenDataSearch>, last visited June 19, 2003.

⁷ See Tab 8 through Tab 11 of the WSSD Request.

departure from precedent must be reversed as arbitrary and capricious within the meaning of § 706 of the [Administrative Procedure Act].”⁸

The courts have repeatedly emphasized that administrative agencies cannot engage in the kind of arbitrary and capricious behavior exhibited by SLD in this case:

Courts reviewing administrative action require consistency from the government—whether the context be the denial of a regulatory exemption, the denial of a license, or the issuance of a cease and desist order ... In every context, the overriding principle of fairness is always the same: the government must govern with an even hand.⁹

Agencies thus cannot engage in disparate treatment of similarly situated entities.

As the U.S. Court of Appeals for the Fourth Circuit has observed,

[T]he scope of judicial review under the arbitrary and capricious standard is narrow. There must be, however, a rational basis for the agency's action. Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary.¹⁰

Though the courts recognize that “absolute consistency” or “perfect symmetry” in administrative decision-making is impossible to achieve, the law nevertheless “does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, and

⁸ Kenneth Culp Davis and Richard Pierce, *Administrative Law Treatise* § 11.5 (3rd Ed. 1994).

⁹ *United States of America v. Undetermined Quantities of an Article of Drug Labeled as "Exachol," et al.* 716 F. Supp. 787, 795 (S.D.N.Y. 1989) (citations omitted), *citing, inter alia*, *Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976); *Frozen Food Express, Inc. v. United States*, 535 F.2d 877 (5th Cir. 1976).

¹⁰ *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (citations omitted, emphasis added).

another for Tuesday, a rule for general application, but denied outright in a specific case.”¹¹

SLD’s disparate treatment of WSSD’s funding application, as compared to applications containing identical or even less detailed service descriptions, violates the principles of fairness and due process required for administrative decision-making. To protect WSSD’s right to rational and even-handed treatment by SLD, the Commission must reverse SLD’s denial of WSSD’s application.

B. SLD’s Imposition Of A New 470 Standard Usurps Rulemaking Authority Reserved Exclusively To The Commission

SLD’s denial of WSSD’s application for failing to provide more detail and specificity than SLD has required in the past is not only arbitrary and capricious but patently inconsistent with the Commission’s established rules and policies regarding the level of specificity required in Form 470s.

The Commission established the Form 470 posting requirement to “provide a minimally burdensome means”¹² for schools and libraries to alert potential vendors to their procurement activities and thereby ensure a competitive selection process, consistent with state and local rules. The Commission declared that

enabling schools and libraries to post relatively simple requests on a website would provide a minimally burdensome means for them to get competing providers to approach them, so that schools and libraries could then select the best service packages subject to their

¹¹ *Frozen Food Express, Inc. v. United States*, 535 F.2d 877, 880 (5th Cir. 1976), *quoting Mary Carter Paint Co. v. Federal Trade Commission*, 333 F.2d 654, 660 (5th Cir. 1964), *rev’d on other grounds*, 382 U.S. 46 (1965).

¹² *Federal-State Joint Board on Universal Service* (Order), 15 FCC Rcd 6732, 6733, ¶ 3 (1999).

state and local rules. The Commission, therefore, require[s] that the administrator of the schools and libraries support mechanism establish and maintain a website that would be known and accessible to all providers to allow them to identify potential customers quickly and easily.¹³

The Commission later emphasized that, “[i]n submitting its FCC Form 470, an applicant is required to provide only general information about the services for which it seeks discounts.”¹⁴

WSSD provided a breadth and depth of information on its Form 470 – like the many schools before it whose applications have been granted – which exceeded the “relatively simple” and “minimally burdensome” information contemplated by the Commission. As the Commission’s decisions have made clear, the purpose of the Form 470 is not to replace the more detailed specifications of terms, conditions, and services that may be required as part of the state or local procurement process. Rather, the form must only “include information sufficient to enable service providers to identify potential customers. ...[A]ny additional information ... that is not submitted for posting on the website under FCC Form[] 470 ... can be made available to interested service providers

¹³ *Id.*

¹⁴ *Request for Review of the Decision of the Universal Service Administrator by Brooklyn Public Library, Brooklyn, New York; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 15 FCC Rcd 18598, 18599 at n.4 (2000) (emphasis added) (“*Brooklyn Public Library*”).

at the election of the school [or] library.”¹⁵ In this case, interested service providers obtained additional information directly from WSSD.¹⁶

WSSD’s competitive bidding process was consistent with this purpose and satisfied the standard established in the Commission’s rules and orders. The information provided by WSSD’s posted Form 470 alerted potential service providers to the services and functions it was seeking and provided sufficient information regarding the requested services to enable service providers to approach WSSD as a potential customer and pursue the process required under state and local law.

SLD has no legal authority to ignore the standard established by the Commission for the information that applicants must provide in their Form 470s and substitute a new conflicting standard of its own making. The Commission has emphasized that SLD (as a division of USAC) can perform only the administrative functions associated with processing applications for E-rate funding, as required by a Congressional directive that USAC’s functions be limited to implementation of rules adopted by the Commission.¹⁷ SLD may not “make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”¹⁸ Indeed, SLD is “prohibited from making decisions of law or

¹⁵ *Federal-State Joint Board on Universal Service* (Fourth Order on Reconsideration), 13 FCC Rcd 5318, 5412-5413, ¶ 162 (1997) (“*Fourth Reconsideration Order*”). In fact, WSSD posted in Box 11 of its Form 470 a point of contact through whom potential vendors could obtain additional information. See WSSD Request at Tab 5.

¹⁶ See WSSD Request at Tab 12, Affidavit of Dr. David W. Shellman, Assistant Superintendent for Technology, Winston-Salem/Forsyth County Schools.

¹⁷ See Conference Report on H.R. 3579, H.R. Rept. No. 105-504, 105th Cong., 2d Sess.

¹⁸ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd 25058, 25067, ¶ 16 (1998).

policy” and must limit its activities “to implementing existing rules and policies established by the Commission.”¹⁹ Accordingly, SLD cannot create a new rule regarding the information applicants must provide on their Form 470s responses and deny funding to applicants who fail to comply with it.

C. SLD Relies On Irrelevant and Inapposite Precedent To Support Its Unreasonable Action

SLD cited no authority for its rejection of the WSSD application in the funding commitment denial letter sent to WSSD.²⁰ However, when SLD relied on precisely the same reason to reject other applications,²¹ it claimed that its action was supported by the Commission’s decision in *Brooklyn Public Library*.²² As discussed in the paragraphs below, however, the *Brooklyn Public Library* case is patently irrelevant to the facts and circumstances of WSSD’s application, nor does the analysis and rationale in the case provide any semblance of support for the reason SLD articulated for denying the WSSD funding application.

In *Brooklyn Public Library*, the library entered into a three-year contract with Bell Atlantic for telecommunications services. The library agreed to pay the usual recurring charges typical of such a service contract. In order to provide the services, however, Bell Atlantic concluded that it would be required to make an extensive capital investment in certain equipment and infrastructure necessary to deliver service. Instead of spreading its investment costs over the life of the contract and recovering them in its recurring charges, as is customary for such

¹⁹ *Id.* at n.46.

²⁰ See WSSD Request at Tab 1.

²¹ See, e.g., Request for Review of the Universal Service Administrator by the Albuquerque School District, CC Dkt. Nos. 96-45, 97-21 at 4-5 (filed May 23, 2003).

services, Bell Atlantic required the library to make a substantial, one-time advance payment in the first year of the contract that would have covered the costs of that investment.

The Commission upheld SLD's refusal to fund the advance payment contemplated by Bell Atlantic. In its original Universal Service Order, the Commission had specifically addressed the question of advance payments and determined that it would not permit them. For a variety of reasons, the Commission concluded that, while schools and libraries could enter into pre-paid/multi-year contracts, the program would only commit funds to cover the portion of a long-term contract that is scheduled to be delivered and installed during the funding year.²³

The library filed an appeal with the Commission in which it argued that the first year payment was not an impermissible "advance payment" but a one-time charge for services that would be delivered and installed in the first funding year. The Commission rejected this argument and concluded that the first year payment was an impermissible advance payment. The Commission also concluded that the library could properly receive funding in the first year for no more than a *pro rata* portion of the charges associated with the multi-year contract.

Nothing in the facts, analysis, or holding of *Brooklyn Public Library* is analogous or even remotely relevant to the circumstances of WSSD's funding

²² See note 14, *supra*.

²³ See *Brooklyn Public Library*, 15 FCC Rcd at 18606, ¶ 19, *citing* Federal-State Joint Board on Universal Service, CC Dkt. No. 96-45, Report and Order, 12 FCC Rcd 8776, 9062, ¶ 544 (1997).

application or SLD's stated reason for rejecting it. The WSSD contract with IBM does not include any impermissible "advance payment" nor do the parties contemplate any initial one-time payment in lieu of recurring charges for telecommunications infrastructure that will be used over many years. The WSSD-IBM agreement is for the installation of internal connections, not the delivery of recurring telecommunications services. WSSD sought funding for precisely those goods and services that the Commission permits to be funded: the costs of equipment that would be delivered and installed during the period covered by the funding year. The *Brooklyn Public Library* decision is simply inapposite, both factually and analytically, to WSSD.

SLD personnel have asserted, however, that the case authorizes SLD to apply a higher standard when evaluating E-rate funding applications that represent a significant jump in a school's funding from the previous year. In effect, SLD interprets *Brooklyn Public Library* as a permit to fashion arbitrary and capricious standards for denying funding applications from disadvantaged schools like WSSD who have a greater need for technology funding. But that authorization appears nowhere in the case. Indeed, the case says absolutely nothing about the Brooklyn Public Library's funding, if any, in the year preceding the application under review. SLD's reliance on the case to justify rejection of an otherwise lawful application is simply mystifying.

The case does mention the Commission's concern that unrestricted upfront payments for multi-year service agreements could create a "critical drain"

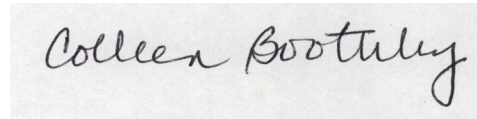
upon the universal service fund.²⁴ But if unanticipated demand for internal connections funding is SLD's concern, and it rejected WSSD's application in an effort to arbitrarily restrict the fund's availability for otherwise permissible internal connections projects like WSSD's, SLD would be, once again, usurping the Commission's rulemaking authority. No such limit has been imposed or authorized by the Commission, nor could it be without a notice and comment rulemaking to revise the Commission's current rules. Indeed, since similar or related issues have been raised by parties in CC Docket No. 02-6, the Commission's pending rulemaking on the E-rate funding mechanism, any attempt by SLD to impose a *de facto* cap by arbitrarily rejecting otherwise meritorious applications like WSSD's would be a patently unlawful attempt to circumvent and prejudge that rulemaking.

²⁴ *Brooklyn Public Library*, 15 FCC Rcd at 18606, ¶ 19.

III. CONCLUSION

For the aforesated reasons, the Commission should reverse the SLD's decision to deny the application for E-rate funding filed by the Winston Salem/Forsyth County School District.

Respectfully submitted,



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June 20, 2003

Certificate of Service

I, Michaelleen I. Williams, hereby certify that true and correct copies of the preceding Request for Review of International Business Machines Corporation ("IBM") was filed electronically with the FCC and served this June 20, 2003 by hand delivery upon the following party:

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A handwritten signature in black ink, appearing to read "Michaelleen I. Williams", written in a cursive style.

Michaelleen I. Williams
Legal Assistant

June 20, 2003